

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-090184

10/03/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

DEBORAH RICHARDSON

TODD K COOLIDGE

v.

ARIZONA STATE DEPARTMENT OF
TRANSPORTATION
VICTOR MENDEZ
STACY STANTON

JOHN C DUTTON

OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

This Court has jurisdiction of this administrative appeal pursuant to A.R.S. section 12-910(e). This Court has considered the record of the proceedings, and the memoranda and arguments of counsel.

This appeal follows from a suspension by the Arizona Department of Transportation of Plaintiff's driver's license under Arizona's Implied Consent law.¹ A failure to expressly agree to the test or successfully complete the test is deemed a refusal, and if the violator refuses the violator shall be informed that the violator's license or permit to drive will be suspended or denied for twelve months.² Plaintiff raises two issues on appeal: first, that the Administrative Law Judge erred in not requiring the 5-point procedure established in A.R.S. 28-1323(A) for the admission of breath test results, and second, that the Administrative Law Judge denied Plaintiff her Due Process rights of cross-examination and confrontation by accepting post-hearing evidence in the form of calibration/maintenance records.

It is clear from the written opinion of the Administrative Law Judge that her decision is based on the testimony of the officer regarding Plaintiff's refusal to successfully complete or take further breath or blood tests. Plaintiff's testimony was inconsistent with the testimony of

¹ A.R.S. section 28-1321.

² A.R.S. section 28-1321(B).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-090184

10/03/2003

the officer, and it is a matter for the Administrative Law Judge to weigh the witnesses' credibility. An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the finder of fact's weighing of evidence absent clear error.³ "And, where there is substantial evidence in the record which will support the verdict and it can be said that the error did not contribute significantly to the verdict, beyond a reasonable doubt, reversal is not required."⁴ Accepting the Administrative Law Judge's assessment of the testimony of the officer and of Plaintiff, there is substantial evidence in the record which will support the Administrative Law Judge's finding that Plaintiff did not successfully complete, and refused to take further breath or blood tests.

The second issue raised by Plaintiff is more troubling. The record does reflect that the Administrative Law Judge permitted the officer to submit exhibits (calibration and maintenance records) after the hearing had concluded, and without giving the Plaintiff the opportunity to see those exhibits in advance, or the opportunity to present additional exhibits or cross-examination of the officer after reviewing those exhibits. Revocation of one's driver's license is an important proceeding entitling a party to the protection of procedural due process.⁵ Parties appearing in all of Arizona courts, including hearings on civil traffic and licensing matters, have the right to due process. Article II, Section 4 of the Arizona Constitution provides for the identical due process rights embodied in the 14th Amendment to the United States Constitution. Our fundamental rights of due process include the right to a fair trial, the right to present witnesses' testimony and exhibits in support of one's case. That right includes the right to confront, and cross-examine. The Confrontation Clause of the Sixth Amendment has been recognized as guaranteeing a *fundamental* right when it was incorporated through the 14th Amendment.⁶

A.R.S. Sections 41-1061 and 1062 govern administrative proceedings. In pertinent part, the statutes state that "opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved."⁷ Further, they state that "unless otherwise provided by law, in contested cases the following shall apply... Every person who is a party to such proceedings shall have the right to be represented by counsel, to submit evidence in open hearing and shall have the right of cross-examination."⁸ Accepting post-hearing supplemental evidence denies a party the right to cross-examine and confront that evidence.

³ In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; Ryder v. Leach, 3 Ariz. 129, 77P. 490 (1889)

⁴ State v. Gallegos, 178 Ariz. 1, 11, 870 P.2d 1097, 1107, cert.denied, 115 S.Ct. 330, 513 U.S. 934, 130 L.Ed.2d 289, appeal after remand, 185 Ariz. 340, 916 P.2d 1056, cert.denied 117 S.Ct. 489, 519 U.S. 996, 136 L.Ed.2d 382(1994), citing State v. Thomas, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981)

⁵ See, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); Gausman v. Department of Motor Vehicles, 246 Neb. 677, 522 N.W.2d 417 (1994)

⁶ Pointer v. Texas, 280 U.S. 400, 85 S.Ct. 1065 (1965)

⁷ A.R.S. 41-1061(C).

⁸ A.R.S. 41-1062(A).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-090184

10/03/2003

The Arizona Administrative Code also governs administrative proceedings, and requires that a party shall provide a copy of each exhibit to all other parties at the time the exhibit is offered to the administrative law judge, unless it was previously provided through discovery.⁹ Counsel for Plaintiff should have received a copy of the calibration-maintenance records at the time they were submitted to the Administrative Law Judge. The failure to provide such exhibits to Plaintiff, or to give the Plaintiff an opportunity to rebut those exhibits, clearly was error.

The Arizona Supreme Court has previously defined fundamental error as an error that “reaches the foundation of the case or takes from ...(a party) a right essential to his defense, or is an error of such dimensions that it cannot be said it is possible for a ...(party) to have had a fair trial.”¹⁰ The absence of proper confrontation calls into question the ultimate integrity of the fact-finding process.¹¹ The submission of “supplemental evidence” after a trial has been completed, without offering the opportunity for cross-examination and additional evidence to the party against whom the evidence is offered, violates basic concepts of a fair trial. When a party has been denied an essential component of due process, such as the denial of the right to present or confront relevant evidence, this denial constitutes fundamental error. Denial of the fundamental due process rights of cross-examination and confrontation merits reversal.¹²

IT IS THEREFORE ORDERED granting the relief requested by the Plaintiff in this case.

IT IS FURTHER ORDERED reversing and vacating the order of license suspension as ordered by Defendant in this case.

IT IS FURTHER ORDERED vacating the stay order previously issued in this case as no longer necessary, and remanding this matter back to Defendant, Arizona Department of Transportation for all future and further proceedings.

IT IS FURTHER ORDERED that counsel for Plaintiff shall lodge an order consistent with this opinion no later than November 25, 2003.

⁹ Ariz. Admin. Code R2-19-115(C).

¹⁰ State v. King, 158 Ariz. 419, 424, 763 P.2d, 239, 244 (1988)

¹¹ Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

¹² Pointer v. Texas, supra.